No. 82-912

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 47 U.S.C. 399, which prohibits "editorializing" by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment.

PARTIES TO THE PROCEEDING

The parties in the district court, in addition to those in the caption, were the Pacifica Foundation and Congressman Henry Waxman.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-20a) is reported at 547 F. Supp. 379.

JURISDICTION

The judgment of the district court (J.S. App. 21a-22a) was entered on August 5, 1982. The notice of appeal (J.S. App. 23a) was filed on September 3, 1982. On October 26, 1982, Justice Rehnquist extended the time for docketing an appeal until December 1, 1982, and the appeal was docketed on that date. On February 28, 1983, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252.

We addressed the question of this Court's jurisdiction in the reply brief filed in response to appellees' motion to dismiss or affirm and have little to add to it. We stress here the following three fundamental points. First, 28 U.S.C. 1252, on which appellate jurisdiction rests, was enacted to ensure a "prompt determination by the court of last resort

of disputed questions of the constitutionality of acts of the Congress" (H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937)). The section therefore carefully specifies that appeal may be taken from "an interlocutory *or* final" order (28 U.S.C. 1252; emphasis added).[1] Appellees' argument would defeat that intent by delaying such litigation until the wholly unrelated question of attorneys fees is resolved in the lower court. Second, appellees in this case were not in any way prejudiced by the timing of the filing of the August 16 motion regarding attorneys fees or the notice of appeal. Third, the issue still pending in district court—the award of attorneys fees—is completely separate from the constitutional question raised in our appeal, and there is accordingly no sensible reason why resolution of the constitutional question should await the lower court's disposition of the matter of attorneys fees.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the attached Appendix, *infra*, 1a.

STATEMENT

This case raises the question whether Congress's considered judgment, that noncommercial educational broadcast stations receiving federal government subsidies should be prohibited from editorializing and from partisan participation in political elections, is constitutionally permissible.

Congress's judgment is embodied in 47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, which prohibits those noncommercial educational broadcasting stations that are subsidized by grants from the Corporation for Public Broadcasting ("CPB" or "the Corporation") from "editorializing" and from "support[ing] or oppos[ing] any candidate for political office."

Congress made it clear in enacting this provision that its intention was not to restrict the airing of controversial or political *programs* but only "editorials representing the opinion of the management of [the] station" (H.R. Conf. Rep. No. 794, 90th Cong., 1st Sess. 12 (1967)). According-

[1] See *McLucas* v. *DeChamplain*, 421 U.S. 21, 30 (1975).

ly, the Federal Communications Commission has construed the term "editorializing" to mean only the "use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the *licensees' own views* on public issues * * *" (*In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973) (emphasis added)). Subsidized public stations—like all other stations—remain free to air programs espousing views on all matters of public concern, whether political or nonpolitical, partisan or nonpartisan, so long as it is "made clear that the editorials are not made on behalf of the licensee or its management" (J.A. App. 8a).[2]

As originally enacted in 1967, Section 399 applied to all noncommercial broadcasting stations. In 1978, the Senate defeated a proposal to limit the provision to stations "licensed to any governmental agency or instrumentality."[3] In 1979 appellees—the Pacifica Foundation, the League of Women Voters, and Congressman Henry Waxman—brought this suit in the United States District Court for the Central District of California challenging the constitutionality of Section 399.[4] Pacifica is a nonprofit, tax-exempt corporation that owns and operates noncommercial radio stations in five major cities: New York; Los Angeles; Washington, D.C.; Berkeley, California; and Houston.[5] Following various procedural and jurisdictional complica-

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[2] Indeed, Section 399 permits "the expression of views on public issues by employees of a noncommercial educational broadcast station in their capacity as individuals * * * provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management" (*In re Complaint of Accuracy in Media, Inc., supra*, 45 F.C.C.2d at 302).

[3] S. 2883, 95th Cong., 2d Sess. § 404(a) (1978). See pp. 25-26, *infra*.

[4] The district court did not decide whether the League or Congressman Waxman had standing to bring this action, since their complaint, as ultimately amended, did not seek any relief not also requested by Pacifica (J.S. App. 7a).

[5] J.S. App. 6a; Dep't of the Treasury, *Internal Revenue Service Pub. No. 78 (Rev. 1-82), Cumulative List of Organizations* 764 (1981); CPB, *1982 CPB Public Broadcasting Directory* 21, 22, 25, 39, 47.

tions,[6] the government urged the court to uphold the constitutionality of the statute at least insofar as it applied to publicly-funded stations.[7] While the suit was pending, Congress amended the prohibition against editorializing to apply only to those stations that receive CPB funds. Appellees then amended their complaint and abandoned their attack on the portion of the statute forbidding public broadcasters to endorse political candidates; the sole remaining claim was that the ban on editorializing violates the Constitution (J.S. App. 5a).

The district court granted summary judgment in favor of appellees (J.S. App. 21a-22a). It did so on the premise (*id.* at 11a) that "Section 399 can survive scrutiny under the First Amendment only if it meets the standard generally used in First Amendment cases, that is, that it serves a compelling government interest and is narrowly tailored to that end." Observing that "regulations such as § 399 are presumptively unconstitutional" (*ibid.*), the court held that Section 399 was not supported by any compelling government interest (*id.* at 12a-18a).

The court rejected the contention (J.S. App. 11a) that "§ 399 serves a compelling government interest in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government." The court (*id.* at 12a-13a) considered Congress's fear of undue government

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[6] In October 1979, in response to the filing of this suit, then Attorney General Civiletti informed the Senate that the Department of Justice would not defend the constitutionality of the statute, in part because it applied to all public broadcasting stations and not just to those receiving federal aid (J.A. 13). The Senate then adopted a resolution, pursuant to 2 U.S.C. (Supp. V) 288e(a), directing its counsel to intervene as amicus curiae and to defend the suit (J.S. App. 3a & n.3). The district court nevertheless dismissed the complaint on the ground that there was no justiciable controversy because the government had decided not to enforce the statute (J.S. App. 4a). In April 1981, while the case was pending on appeal, Attorney General Smith notified the Senate that the government would defend the constitutionality of the statute (J.A. 15-16). The court of appeals remanded the case to the district court; the district court vacated its order of dismissal; and the Senate Legal Counsel withdrew from the litigation (*ibid.*).

[7] See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 11-20.

influence resulting from federal funding to be unfounded because "CPB funding in 1977 did not constitute more than approximately 25%" of the budget of the average station receiving such aid and because the amount of CPB funding was being reduced. The court also concluded (*id.* at 13a-14a) that Congress's fear was unfounded because the CPB "is an independent, nonprofit, private corporation"; its "funding decisions are based on objective, nondiscretionary criteria"; and the "fairness doctrine"[8] prevents broadcasters from presenting "one-sided political propaganda." The court rejected (*id.* at 15a) the government's contention that "restrictions on editorializing are necessary to ensure that government funding of noncommercial broadcast stations will not interfere with the balanced presentation of opinion on those stations," concluding (*id.* at 17a) that "[t]he protections offered by the fairness doctrine effectively eliminate any substantial danger of 'unbalanced' programming."[9]

SUMMARY OF ARGUMENT

This case presents the question whether 47 U.S.C. 399, which prohibits "editorializing" and "support[ing] or oppos[ing]" political candidates by noncommercial broadcasting stations that receive federal subsidies from the Corporation for Public Broadcasting, violates the First Amendment. The term "editorializing" means the expression of views directly by or on behalf of the station's management; the statute does not otherwise restrict expression and in no way prevents controversial public affairs programming.

I

The cardinal teaching of this Court's cases involving freedom of expression in broadcasting is that broadcasting is a special national resource, and that the validity of any challenged regulation must be decided in the context of its unique characteristics and problems. Given the special

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[8] The meaning of the fairness doctrine is discussed at pp. 38-39 & n.70, *infra*.

[9] The district court "base[d] its decision squarely on the First Amendment" and did not rule on appellees' equal protection challenge to the statute (J.S. App. 19a).

character of noncommercial—"*public*"—broadcasting, Section 399 is plainly constitutional.

A. Public broadcasting is the product of a national commitment, financed by government, to create broadcast services not provided by the private sector. It operates on scarce and valuable television and radio channels reserved by government for noncommercial use. The federal government provides large subsidies to public broadcasting for construction of facilities, for production of programs, and for station operations. It also provides critical tax subsidies to tax-exempt noncommercial stations. State and local governments also provide substantial subsidies. Direct government subsidies total 59% of public television income and 67% of public radio income.

Units of government and government instrumentalities own more than two-thirds of all public television stations and approximately three-fifths of all public radio stations.

Public television and radio are, in sum, inextricably entwined with government. Created and sustained in order to promote excellence and diversity in broadcasting, they were designed as a community resource—not a private vehicle—to be supported by all and to serve all.

To ensure that public broadcasting fulfills its public mission, it is subject to special restrictions. Public stations may not sell time or accept advertising. They may not operate for profit, may not support or oppose political candidates, and are subject to special rules of financial disclosure, accounting, and employment practices. Congress also has enacted special measures designed to see that public stations broadcast educational and cultural programs, meet the educational and cultural needs of their communities, and maintain strict objectivity and balance in controversial programs and series.

B. Congress has repeatedly manifested its judgment that the public broadcasting system can achieve its purposes only if it refrains from direct partisan interventions in the political arena. More particularly, the legislative history of Section 399 demonstrates Congress's judgment that allowing owners and managers to use public stations to editorialize and electioneer would invite government pressure;

would unfairly devote public moneys to the propagation of private views; would place an official imprimatur on certain views while disfavoring others; and would jeopardize the broad support that public broadcasting needs.

C. This Court's decisions leave ample space for that congressional judgment. The Court has recognized that, in view of broadcasting's special characteristics, the First Amendment permits—indeed, is served by—regulations to insure diversity and fair balance in the use of that medium. Thus, while the right of the print media to be partisan is virtually unlimited, this Court has upheld significant limitations upon the right of all broadcasters to serve private and partisan ends.

D. Public stations constitute a publicly-supported educational and cultural resource for the entire community; their purpose is not to become outlets for the propagation of specific private views. If such stations were permitted to editorialize or electioneer, they would become inviting targets for narrowly based groups hoping to acquire a powerful voice at public expense. And embroilment in partisan political controversies could distract licensees from their public mission and threaten the public support educational broadcasting needs to maintain its independence, its privileged status, and its financial health.

The ban on editorializing also insulates public stations against pressure to become instruments of government propaganda. Government holds the purse-strings, supplying more than 60% of public broadcasting income. It owns the majority of public stations. The danger of government control is, therefore—as Congress has repeatedly found—formidable, and justifies Section 399's protective shield.

The prohibition against editorializing also protects First Amendment values by preventing the use of tax funds to promote private views with which many taxpayers may disagree. "A system which secures the right to proselytize * * * must also guarantee the concomitant right to decline to foster such concepts." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

E. The ban on editorializing interferes only minimally with the free marketplace of ideas. It only prohibits the privileged use of public stations for "official" expressions of opinion by or on behalf of station owners and management. Public broadcasting in fact provides excellent public affairs programming on which a lively and diverse range of views is expressed on many controversial issues. And station owners and managers—like the rest of the public—remain free to express their views by all other means.

II

Section 399 is also constitutional because it represents a valid exercise of Congress's Spending Power. Section 399 does not prevent licensees of public stations from expressing their opinions. It simply provides that the government will not pay for it.

For First Amendment purposes, Section 399 is indistinguishable from Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.), which grants a subsidy in the form of tax exemption only to those nonprofit organizations that do not devote a substantial part of their activities to lobbying or propagandizing. In *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983), this Court unanimously upheld that measure. The Court found that Section 501(c)(3) does not prevent any organization from exercising its First Amendment rights but merely represents Congress's refusal to pay for those activities out of public funds. The provision at issue here is constitutional for precisely the same reason.

Section 399 is readily distinguishable from situations in which it was held that government improperly denied a person a benefit because he exercised a constitutional right. The measures held unconstitutional in those cases were content-based restrictions adopted to restrain speech rather than to insure that government funds were used for public purposes. In contrast, Section 399 is a content-neutral regulation designed to assure that public funds do not go to subsidize private political and ideological activity.

ARGUMENT

SECTION 399's PROHIBITION AGAINST "EDITORIALIZING" IS A PERMISSIBLE REGULATION OF PUBLIC BROADCASTING STATIONS RECEIVING GRANTS FROM THE CORPORATION FOR PUBLIC BROADCASTING

I. CONGRESS HAS POWER TO ESTABLISH AND FINANCE A PUBLIC NONCOMMERCIAL AND EDUCATIONAL BROADCASTING SYSTEM AND TO REQUIRE THAT SUBSIDIZED STATIONS LICENSED AS PART OF THAT SYSTEM REFRAIN FROM DIRECT EDITORIALIZING AND POLITICAL ELECTIONEERING

This case concerns Congress's power to regulate educational noncommercial broadcasting stations receiving federal government subsidies. It is not a coincidence that these stations are often referred to as *public* broadcasting stations, and that together they constitute the *public* broadcasting system. The very existence of this sort of broadcasting is a product of a national commitment, financed by government funds, to create and sustain broadcast services and programs of a sort not provided by the private, commercial sector of the broadcast industry. Public broadcasting stations exist in order to serve as a special community resource—not in order to benefit their owners, either by enriching them or by giving them special power and influence.

Ever since Congress undertook a serious national program to create and sustain a public broadcasting system, it has manifested its considered judgment that the system can achieve its purposes only if it remains, in some sense, nonpartisan and nonpolitical. This judgment is an integral part of the scheme that Congress set on foot when it created and funded the system. The judgment is manifested in the provision at issue in this case, which in effect provides that the owners and managers of federally-funded noncommercial educational stations may not use those stations to engage in direct partisan interventions in the ideological and political arena.

The district court's decision, invalidating this provision, seriously interferes with the congressional plan for public broadcasting. It simply sets aside Congress's judgment that allowing public stations to editorialize would interfere with the rendering of the services they were designed to provide. And it flatly overrules Congress's judgment that public broadcasting must be protected from the political pressures that would be evoked by partisan interventions into the political and ideological arena.

The district court's decision also ignores the central lesson of this Court's decisions about the meaning of the First Amendment in the context of broadcasting. That lesson is that broadcasting as a whole is a special national resource, the wise use of which requires and justifies governmental umpiring of a sort that may be inappropriate—because inapposite—in other contexts. The cardinal teaching of this Court's broadcast cases is that the validity of Congress's regulatory judgments must be decided contextually, in the framework of an understanding of the special problems and promises of this medium—rather than on the basis of a wooden application of abstract rules derived from other settings. This principle should, of course, be seen as even more telling when the subject of regulation is public broadcasting, which depends so heavily on a public judgment to reserve space for and fund specific kinds of broadcast services. Nevertheless, the district court dealt with Section 399 without reference to context, as if it were any other statute "restricting the discussion of public issues" (J.S. App. 9a).

This Court has decided numerous and well-known cases involving commercial radio and television, and is fully familiar with that industry and with the doctrines defining the permissible scope of its regulation. By contrast, the Court has decided few cases involving noncommercial broadcasting and has not had occasion to define the extent to which government may regulate its activities in light of its special history, character, and needs. We believe that understanding Section 399 and the role it plays in effectuating the congressional plan for public broadcasting requires an understanding of how this part of the broadcast universe developed, how it is sustained, and by whom it is

controlled. We therefore open this part of our brief with an account of the public broadcasting system ("A"). We then outline the history of Section 399 and sketch the legislative materials that cast light on its purposes ("B"). Part "C" shows that this Court's cases provide a doctrinal framework that gives ample space for Section 399. Part "D" then provides a detailed analysis of the significant public purposes that justify that provision. We conclude in Part "E" by demonstrating that the effects of Section 399 in restraining speech are minimal.

A. The public broadcasting system was publicly created and is publicly supported to be a community resource[10]

The public broadcasting system developed haltingly over the first 50 years of its existence. It assumed its present form when Congress made a major national commitment by enacting the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U.S.C. (& Supp. V) 390 *et seq.*

1. Educational institutions have operated radio stations since 1919.[11] By 1934, the Federal Radio Commission had issued nearly 300 licenses to educational institutions. Most of these licensees had, however, met insuperable financial difficulties and had assigned their licenses to commercial stations;[12] only 2% of outstanding licenses were held by noncommercial stations.[13]

In 1934, Congress passed the landmark Communications Act. In connection with that Act, Congress considered whether to reserve 25% of all AM radio facilities for stations operated by nonprofit organizations. See 78 Cong. Rec. 8828-8829 (1934). Congress decided, however, not to

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[10] For comprehensive accounts of the noncommercial public broadcast system, we refer the Court to the two landmark reports on that system sponsored by the Carnegie Corporation: Carnegie Commission on Educational Television, *Public Television: A Program for Action* (1967) *("Carnegie I")*, and Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* (1979) *("Carnegie II")*.

[11] S. Frost, *Education's Own Stations* 464 (1937).

[12] Note, *The Legal Problems of Educational Television*, 67 Yale L.J. 639, 642 & n.14 (1958).

[13] 78 Cong. Rec. 8829 (1934).

deal with this matter by legislation; rather, the issue was left to the FCC. The Commission, in turn, conducted hearings but determined not to act (*FCC Report Pursuant to § 307(c) of the Communications Act* 5 (1935)).

After the Second World War, the Commission recognized that noncommercial broadcasting could not flourish without special protection. In 1945, therefore, it decided to allocate 20 FM radio channels exclusively for educational use.[14] More important, in 1952—before the first educational television station went on the air[15]—the Commission reserved 242 television channels for educational broadcasting, including 80 on the VHF band.[16] The critical importance of this step cannot be exaggerated. Without it, there is little doubt that virtually all of the scarce and lucrative VHF channels in major markets would have been occupied by commercial broadcasters.[17] (The UHF band was relatively insignificant until after 1962, when Congress required that all new sets be capable of receiving both VHF and UHF.[18] And even today, UHF outlets continue to be much less desirable than VHF stations).[19] As a result of the reservations, VHF edu-

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[14] FCC, *Report of Proposed Allocations from 25,000 Kilocycles to 30,000,000 Kilocycles* 77 (1945).

[15] *Carnegie I*, *supra*, at 21.

[16] *Sixth Report and Order*, 41 F.C.C. 148 (1952).

[17] In the then ten largest cities, commercial stations had taken all available VHF channels in seven (New York, Philadelphia, Los Angeles, Detroit, Baltimore, Cleveland, and Washington, D.C.). Bureau of the Census, *Statistical Abstract of the United States 1976*, at 23-24; *Sixth Report and Order*, 41 F.C.C. 148 (1952). Except for New York, all these cities still lack a noncommercial VHF outlet. CPB, *1982 CPB Public Broadcasting Directory* 67, 69, 74-75, 80; RCA Broadcast Systems, *Television & Cable Factbook* 1014, 1046 (1982-83 ed.). A noncommercial VHF station for the New York City area was established in 1962 when an educational broadcasting organization bought a commercial station in Newark, N.J., for $5.75 million. *Carnegie II*, *supra*, at 315-316; E. Barnouw, *The Image Empire—A History of Broadcasting in the United States* 197-198 (1970).

[18] See All Channel Receiver Act, Pub. L. No. 87-529, Sections 1 and 2, 76 Stat. 150 and 151 (codified at 47 U.S.C. 303(s) and 330(a)). This legislation "was of crucial importance to noncommercial television" (E. Barnouw, *supra* note 17, at 201). See also *Carnegie II*, *supra*, at 34.

[19] UHF transmitters require much greater power than VHF and are

cational stations came into existence in those major cities (*e.g.*, Boston, Chicago, and San Francisco) where channels were still available.[20]

Despite the reservation of special channels, educational broadcasting developed slowly. By the mid-1950's, less than half of the reserved television channels had been applied for. Many of these unactivated channels were in communities that could support additional commercial outlets.[21] The Commission therefore began deleting certain unactivated educational reservations.[22]

In 1962, there were only 54 educational TV stations on the air; two-thirds of the population had no access to educational television. S. Rep. No. 67, 87th Cong., 1st Sess. 3 (1961). A Senate report (*ibid.*) attributed this slow progress to the fact that "the problem of fundraising has seemed almost insurmountable in spite of almost herculean efforts on the part of many of our leading educators and civic leaders." The report also concluded (*ibid.*) that "once a station has been built, State legislatures, local educational systems, and local communities raise the funds to produce the programming and operate the stations." Congress therefore enacted the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, which authorized $32 million over five years to aid the construction of educational stations. By 1967 when this program expired, 126 educational stations were operating.

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less efficient, and UHF reception is generally inferior. *Carnegie II*, *supra*, at 239 n.9.

[20] On the following dates, noncommercial VHF stations began operations in major cities. In 1953: KUHT in Houston. In 1954: WQED in Pittsburgh, KQED in San Francisco, KETC in St. Louis, and KCTS in Seattle. In 1955: WGBH in Boston and WPBT in Miami. In 1956: KRMA in Denver. In 1957: WTTW in Chicago, WMVS in Milwaukee, KTCA in Minneapolis-St. Paul, WYES in New Orleans, and KOAC in Portland, Oregon. In 1958: KUED in Salt Lake City. In 1960: KERA in Dallas. In 1961: KAET in Tempe (Phoenix), Arizona. CPB, *1982 CPB Public Broadcasting Directory* 66, 68, 70, 71, 73, 74, 76, 81, 82, 84, 85, 86; RCA Broadcast Systems, *Television & Cable Factbook* 1014 (1982-83 ed.).

[21] Note, *supra* note 12, at 646.

[22] *Report and Order*, 41 F.C.C. 784, 786 (1956).

In 1967, a Carnegie Corporation Commission created to study educational broadcasting found that there were too few stations and that those in existence were "inadequately staffed, inadequately equipped, and inadequately financed. Deficiencies affect the entire system * * *." *Carnegie I*, *supra*, at 33 (see note 10, *supra*). The Commission recommended creation of a federally-chartered "Corporation for Public Television" to provide support for noncommercial broadcasting, including funding for program production, and the establishment of "interconnection" facilities to permit nationwide broadcasting of noncommercial programs (*id.* at 36-41). The Commission also recommended that federal funds be distributed to stations to support their general operations, and that a new federally-funded facilities program be started (*id.* at 74-80). To finance these measures without subjecting public broadcasting to political pressures, the Commission recommended a dedicated federal excise tax on the sale of all television sets (*id.* at 68-73).

2. The most important event in the history of noncommercial broadcasting was the enactment of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U.S.C. (& Supp. V) 390 *et seq.* Sponsored by President Johnson and incorporating most of the recommendations of the Carnegie Commission, this statute created the public broadcasting system of today. Title I provided new construction grants. Title II created the Corporation for Public Broadcasting, a nonprofit, government-chartered corporation governed by a 15-person board of directors appointed by the President with the advice and consent of the Senate (see 47 U.S.C. (& Supp. V) 396(b)-(f)). The Corporation was authorized to make grants to stations, to fund the production of programs, and to assist in the establishment and development of interconnection systems (47 U.S.C. (Supp. V) 396(g)), such as the subsequently created Public Broadcasting System.[23] Departing from the Carnegie Commis-

[23] The Public Broadcasting System (PBS) "was established by the Corporation for Public Broadcasting and the nation's public television licensees in 1969 as the interconnection service for public television. It was reorganized in 1973 as a membership-supported organization. PBS is responsible for the scheduling, promotion and distribution of the na-

sion recommendation, Congress accepted President Johnson's proposal that the Corporation's funds be drawn from general revenues until the question of financing could be studied further.[24] This method of financing has in fact been retained (see 47 U.S.C. (Supp. V) 396(k), as amended by Pub. L. No. 97-53, Title XII, Section 1227, 95 Stat. 727).

Congress's purpose in creating the new broadcasting system was lofty. Public broadcasting was to provide a diversity of educational, cultural, and public affairs programming that commercial stations had failed to furnish. During the late 1950s and 1960s, there was concern that commercial television had settled into a disappointing pattern.[25] Public broadcasting, in addition to serving its traditional instructional functions, was to provide a space where excellence and diversity could flourish. It was to educate, broaden, challenge, enlighten, and at times disturb; it was to make history and science and great works of art accessible to a huge new audience. Its goal was not to create a privileged outlet for particular tastes or views, but rather to expand and diversify the audience's experiences.[26]

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tional program service to noncommercial television stations across the country, and for representation of the public television stations' interests at the national level." CPB, *Ten Years of Public Broadcasting, 1967-1977*, at 14 (1977). PBS obtains and distributes programming from member stations and other sources (*ibid.*). National Public Radio, established by CPB in 1971, performs an analogous service for public radio stations (*id.* at 15).

[24] *Special Message to the Congress: "Education and Health in America."* 1 Pub. Papers 250 (Feb. 28, 1967); Pub. L. No. 90-129, Title II, Section 201, 81 Stat. 367.

[25] See E. Barnouw, *supra* note 17, at 197-198.

[26] See *Remarks Upon Signing the Public Broadcasting Act of 1967*, 2 Pub. Papers 474 (Nov. 7, 1967) (remarks of President Johnson); *The Public Television Act of 1967: Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 128 (1967) (Roger L. Stevens, chairman, National Foundation on the Arts and Humanities); *id.* at 173 (Fred Friendly, former president, CBS News); *id.* at 366-367 (James D. O'Connell, White House Director of Telecommunications Management); *Public Television Act of 1967: Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 28 (1967) (John W. Gardner, Secretary of HEW); *id.* at 122-123 (James R. Killian, Jr., Carnegie Commission chairman); *id.* at 279-280

To achieve these objectives, Congress could of course have created a federally owned and operated broadcasting network, such as the BBC. Had it done so, it unquestionably could have insisted that the network refrain from editorializing and maintain strict political neutrality. "Government is not restrained by the First Amendment from controlling its own expression." *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring); see also T. Emerson, *The System of Freedom of Expression* 700 (1970). However, partly because of fear of the enormous power that a federally-owned network could wield,[27] Congress adhered to the tradition of not creating federally owned stations and chose instead to furnish assistance to noncommercial stations owned and controlled by others. But in order to make sure that public broadcasting would remain true to its mission, it was subjected to certain special restrictions and obligations. Most important, public broadcasters were prohibited from selling air time for any purpose whatever—including selling time for political or public affairs presentations.[28] Public broadcasting stations were required to be government entities or nonprofit organizations (47 U.S.C. (Supp. V) 397(5) and (7)). "[E]ducational television or radio programs" were defined by the Act as "programs which are primarily designed for educational or cultural purposes" (47 U.S.C. 397(9)), thereby limiting both the types of programs that the Corporation could fund and the activities of the stations it assisted (47 U.S.C. (Supp. V) 396(g)(2)(B) and (C)).[29] The

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(Julian Goodman, NBC president); *id.* at 371 (McGeorge Bundy, Ford Foundation president); *id.* at 377-379 (Fred Friendly); *id.* at 446 (William G. Harley, president of National Association of Educational Broadcasters); *Carnegie I*, *supra*, at 13, 17-18, 92-99.

[27] See pp. 22-25, *infra*.

[28] See 47 U.S.C. (Supp. V) 397(7); 47 C.F.R. 73.503(d) (radio); 47 C.F.R. 73.621(e) (TV). In 1981, Congress added 47 U.S.C. (Supp. V) 399a, as amended by Pub. L. No. 97-35, Title XII, Section 1230, 95 Stat. 730, which reiterates the ban on advertisements and specifically prohibits political or public affairs advertisements.

[29] A House provision that would have prohibited mere "amusement" or "entertainment" was struck by the Conference Committee. H.R. Conf. Rep. No. 794, 90th Cong., 1st Sess. 13 (1967).

Corporation was instructed to facilitate the development of a public broadcasting system with "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" (47 U.S.C. (Supp. V) 396(g)(1)(A)).[30] In the provision at issue here, noncommercial stations were forbidden to editorialize or endorse or oppose political candidates. Finally, stations receiving CPB funds were made subject to audit by the General Accounting Office (47 U.S.C. (Supp. V) 396(e)).[31]

The activities of noncommercial broadcasting stations are also significantly restricted as a consequence of the fact that virtually all of those not owned and operated by governmental entities are qualified for tax exemption under Section 501(c)(3) of the Internal Revenue Code (see 47 U.S.C. (Supp. V) 397(5) and (7)), and thus may not devote a substantial amount of their activities to "carrying on propaganda, or otherwise attempting, to influence legislation."

The 1967 Act initiated a period of substantial growth in public broadcasting. The number of noncommercial television stations has grown from 126 to more than 290;[32] the

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[30] Cf. *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288, 297 (D.C. Cir. 1975) (provision is "set of goals to which the Directors of CPB should aspire," "not a substantive standard, legally enforceable by agency or courts") (footnote omitted); compare Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123, 1161 (1974).

[31] In succeeding years, additional restrictions have been imposed. Recipient stations not owned by governmental entities are required to establish "community advisory board[s]" that are "reasonably representative of the diverse needs and interests of the communities" they serve. These boards must be permitted to review the stations' programming goals, service, and significant policy decisions. The boards must advise the stations whether they are meeting community educational and cultural needs and may make recommendations. 47 U.S.C. (Supp. V) 396(k)(9). Recipient stations are subject to stringent accounting (47 U.S.C. (Supp. V) 396(e)) and financial disclosure (47 U.S.C. (Supp. V) 396(k)(5)) requirements, and special equal employment opportunity rules (47 U.S.C. (Supp. V) 398(b)). The meetings of their governing bodies must generally be open to the public (47 U.S.C. (Supp. V) 396(k)(4)).

[32] CPB, *Annual Report 1981*, at 3.

number of noncommercial radio stations qualified for CPB grants from 73 to 238.[33] In fiscal 1969, Congress appropriated approximately $9 million for the CPB. Pub. L. No. 90-129, Title II, Section 201, 81 Stat. 367. In fiscal 1983, the figure was $172 million.[34] In 1969 public television stations broadcast an average of 56 hours per week; by 1981 that figure was 98.7 hours per week.[35]

Despite this growth, it is important to remember that public broadcasting stations remain a scarce and valuable resource. Most major cities have at least three commercial television stations; few have more than a single public station.[36] There are still only 111 public VHF TV stations in the entire country, as compared with 527 commercial VHF stations.[37]

3. Public broadcasting's entanglements with and dependence on government are abundantly clear.

Funding. In fiscal 1981, 60.4% of public broadcasting's total income came from federal, state, or local government. CPB, *Public Broadcasting Income Fiscal Year 1981*, at 8 (1983). The federal government's contribution (25.2%) was the largest, followed by that of state governments (18.8%), state colleges (10.6%), and local governments (5.8%). *Ibid.* Public television, whose revenues dwarf those of public radio,[38] received 59% of its income from government; federal

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[33] CPB, *Annual Report 1981*, at 3. Only full-service radio stations are qualified for CPB grants. CPB, *Policy for Public Radio Station Assistance* (1981). See p. 26 and note 54, *infra*.

[34] Executive Office of the President, Office of Management and Budget, *Appendix to the Budget for Fiscal Year 1984*, at I-VI4.

[35] CPB, *Annual Report 1981*, at 3.

[36] Of the 25 largest cities, only six (New York, Los Angeles, Washington, D.C., Boston, San Francisco, and Milwaukee) have two public stations, and virtually none of the smaller cities has more than one. CPB, *1982 CPB Public Broadcasting Directory* 66-88; Bureau of the Census, *Statistical Abstract of the United States, 1982-83*, at 22-24. Even in cities with two public stations, programming between the two is often duplicative. Public radio stations are overwhelmingly concentrated on the FM band. CPB, *1982 CPB Public Broadcasting Directory* 18-50.

[37] FCC News Release (Mar. 14, 1983).

[38] In fiscal year 1981, public television received 80% of all public

funds constituted 23.7% of total income. *Id.* at 9. Public radio derived 66.8% of its income from government; 31.7% came from federal sources. *Id.* at 10.

In fact these figures understate governmental contributions to public broadcasting. In the year ending October 1981, more than 25% of the CPB's television subsidies were devoted to funding television program production and distribution. CPB, *Annual Report 1981*, at 28-29. These funds are, of course, indirect subsidies to stations that would otherwise have to bear full production and distribution costs.

Other federal departments and agencies also finance the production of television shows supplied to public stations at no cost or at less than cost.[39] The Department of Education, which finances production of such popular programs as *Sesame Street* and *The Electric Company*, has determined that nearly one-fifth of the programs aired on the average noncommercial station are produced with its funds.[40]

Private donations, which constituted 14.4% of public broadcasting income in fiscal year 1981,[41] are themselves governmentally stimulated by the "matching fund" principle: CPB appropriations are based in part on the amount of nonfederal revenues received by public stations.[42] Even

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broadcasting income. CPB, *Public Broadcasting Income Fiscal Year 1981*, at 8-10 (1983).

[39] See, *e.g.*, Pub. L. No. 97-35, Section 561, 95 Stat. 469 (Department of Education).

[40] Letter from Department of Education to James L. Loper, president of KCET, *reprinted in* Br. for Petitioner Community Television of Southern Calif. at 1a, *Community Television of Southern California* v. *Gottfried*, Nos. 81-291, 81-799 (filed Feb. 22, 1983); S. Katzman & N. Katzman, *Public Television Programming Content by Category Fiscal Year 1978* (1979).

[41] CPB, *Public Broadcasting Income Fiscal Year 1981*, at 8 (1983). In addition to the 60.4% contributed by government and the 14.4% from private subscriptions, business contributed 11.3%, foundations 2.5%, colleges other than state colleges 2.5%, and all others 6.3% (*ibid.*).

[42] 47 U.S.C. (Supp. V) 396(k)(1)(B) and 47 U.S.C. (Supp. V) 396(k)(1)(C), as amended by Pub. L. No. 97-35, Title XII, Section 1227(a), 95 Stat. 727. See also 47 U.S.C. (Supp. V) 396(k)(6)(B)(ii), as amended by Pub. L. No. 97-35, Title XII, Section 1227(d), 95 Stat. 729.

more important, virtually all noncommercial stations are exempt from federal tax, and contributions to those stations are deductible for federal income, estate, and gift tax purposes (26 U.S.C. 170(c), 2055(a), 2106(a), 2522(a) and (b)). See *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983), slip op. 3 ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.").

Ownership. More than two-thirds of the public television stations now in existence are licensed to governmental entities.[43] Many are licensed to state authorities or commissions whose members are public officials or persons appointed by the governor with the approval of the legislature.[44] Other licenses are held by counties, municipalities, school boards, and public colleges and universities.

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[43] CPB, *1982 CPB Public Broadcasting Directory* 66-88; RCA Broadcast Systems, *Television & Cable Factbook* 1007-1059 (1982-83 ed.).

[44] State-owned public television is generally managed by authorities or commissions comprised of public officials or political appointees. In many states, the governor appoints commission members with the advice and consent of the state senate. *E.g.*, Ala. Code § 16-7-2 (Cum. Supp. 1982) (Alabama Educational Commission comprised of seven members appointed by governor with advice and consent of senate); see Alaska Stat. § 44.21.025 (1980); Ark. Stat. Ann. § 80-3902 (1980); Hawaii Rev. Stat. § 314-2 (1976); Wyo. Stat. § 9-3-1102 (1977).

In some states, the legislature joins the governor in actually naming members to the commission. *E.g.*, Or. Rev. Stat. § 354.115 (Repl. 1981) (Oregon Commission for Public Broadcasting comprised of five members appointed by governor, three members appointed by President of the Senate, and three members appointed by Speaker of the House); see Cal. Gov't Code § 8811 (1980); N.C. Gen. Stat. § 143B-426.9 (Cum. Supp. 1981); 71 Pa. Cons. Stat. Ann. § 1188.2 (Purdon Cum. Supp. 1982); S.C. Code Ann. § 59-7-10 (Law. Co-op. 1977).

Many other states combine appointed members with specified public officials who are members ex officio. *E.g.*, N.J. Stat. Ann. § 48:23-4 (West Cum. Supp. 1982) (New Jersey Public Broadcasting Authority comprised of five cabinet officers and ten other members appointed by governor with advice and consent of Senate); see Ky. Rev. Stat. Ann. § 168.040 (1980); La. Rev. Stat. Ann. § 17.2503 (West 1982); Mass. Gen. Laws Ann. ch. 65 (1982); Neb. Rev. Stat. § 79-2102 (1981); N.D.

The ownership of full-service public radio stations is also dominated by government-affiliated entities. Of the 262 stations qualified to receive CPB assistance, 58% are licensed to such bodies.[45]

In sum, the entire noncommercial broadcasting system as it now exists is, in a very special sense, public. Without substantial sustained public support it would never have developed, and without that support it would almost certainly wither.

B. Congress enacted and retained the prohibitions of Section 399 in order to maintain the independence of subsidized public broadcasting from government influence and to serve other important First Amendment purposes

The legislative history of Section 399 makes clear that Congress recognized that the use of public stations for direct editorializing and political endorsements would be incompatible with the public broadcasting system that Congress sought to create—a system dedicated to public

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Cent. Code ch. 15-65 (1981); Ohio Rev. Code Ann. § 3353.02 (Page Supp. 1982); Okla. Stat. Ann. tit. 70, § 23-105 (West Cum. Supp. 1982); S.D. Codified Laws Ann. § 13-47-1 (1982); W. Va. Code § 10-5-2 (1976).

A number of states operate public television systems through the state board of education or its equivalent. *E.g.*, Fla. Stat. § 229.805 (1977 & Cum. Supp. 1983) (Florida educational television network operated by State Department of Education pursuant to policies adopted by State Board of Education); see Colo. Rev. Stat. § 22-50-113.7 (Cum. Supp. 1982); Del. Code Ann. tit. 14, §§ 129, 130 (1981); Ga. Code Ann. § 20-2-12 (Cum. Supp. 1982); Iowa Code Ann. § 18.138 (West 1978); Kan. Stat. Ann. § 75-4906 (1977); Mich. Comp. Laws § 15.2090 (1979); N.Y. Educ. Law § 236 (McKinney Cum. Supp. 1982); Tenn. Code Ann. § 49-3853 (Cum. Supp. 1982); Utah Code Ann. § 53-42-1 (1981).

[45] CPB, *1982 CPB Public Broadcasting Directory* 18-50.

purposes and sustained by public funds.[46] Direct partisan interventions would create a serious danger of government propagandizing; would unfairly devote public moneys to the propagation of private views; would place an official imprimatur on some views while disfavoring others; and would jeopardize the broad support that public broadcasting needs for its independence and financial health. These concerns were not only expressed in 1967, when Section 399 was enacted, but were reiterated in 1978, when a proposal to narrow the statute was defeated, and again in 1981, when Section 399 was amended so as to apply in part only to stations receiving CPB grants.

1. One of the dominant themes in the legislative history of the 1967 Act was that a viable system of public broadcasting must be independent; public stations are not to become government propaganda organs. Although Congress naturally focused primarily on the dangers of federal control, concern was also expressed about control by other governmental bodies.

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[46] Appellees would have this Court believe (Br. in Opp. 20 n.13) that Congress enacted Section 399 solely for the illegitimate purpose of "suppress[ing] potentially critical public comment" concerning its members. Appellees cite *(ibid.)* three isolated statements taken out of context from the congressional debates. These statements do not support the argument. Congressman Keith was making the valid point that an administration film promoting its legislative program could have been used against opposing congressmen (113 Cong. Rec. 26391 (1967)). The broadcasting of such federal government propaganda on public stations is just the mischief that Section 399 was designed to prevent. Congressman Joelson (113 Cong. Rec. 26391 (1967)) was discussing slander, which is not protected speech. His remarks were spurred by a colleague's question whether the government could be sued by a private citizen for slander broadcast by a publicly-funded station; he may have meant that "the right of editorializing should be very, very carefully scrutinized" for that reason *(ibid.)*.

In any event, these isolated remarks are of little import. "[I]nquiry into legislative motive is often an unsatisfactory venture. * * * What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 23; see also *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

In recommending passage of the 1967 Act, President Johnson stressed that "[n]on-commercial television and radio in America, even though supported by federal funds, must be absolutely free from any federal government interference over programming" (*Special Message to the Congress: "Education and Health in America,"* 1 Pub. Papers 250 (Feb. 28, 1967)). At the beginning of the Senate subcommittee hearings, the chairman, Senator Pastore, stated: "I intend to see * * * every possible safeguard written into the legislation necessary to assure complete freedom from any Federal Government interference." *The Public Television Act of 1967: Hearings on S.1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 9 (1967) (hereinafter *"1967 Senate Hearings"*). A chorus of witnesses and Senators echoed this view,[47] and several witnesses expressed concern about the adequacy of the bill's safeguards against such interference. The most important concern was that the administration proposal did not provide for a dedicated tax to fund the CPB; instead, it provided (at least initially) for funding from general appropriations.[48] Concern was also expressed about the fact that the members of the CPB board were to be appointed by the President.[49]

The Senate committee, in reporting favorably on the bill, stated that the committee was satisfied that the bill would

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[47] See, *e.g.*, *1967 Senate Hearings*, at 93 (Rosel H. Hyde, FCC chairman); *id.* at 172-173 (Fred Friendly, former CBS news president); *id.* at 197 (John F. White, president of NET); *id.* at 219 (Jack G. McBride, general manager of Nebraska ETV Network).

[48] See, *e.g.*, the criticisms of Fred Friendly and Senator Javits, *1967 Senate Hearings*, at 173, 451-452.

[49] See, *e.g.*, *1967 Senate Hearings*, at 130 (Roger L. Stevens, chairman of the National Foundation on the Arts and the Humanities); *id.* at 449 (Sen. Javits).

The committee sought to remedy this feature by providing for Presidential appointment of nine of the 15 members, with the nine Presidential appointees to elect the remaining six. See S. Rep. No. 222, 90th Cong., 1st Sess. 13 (1967); 113 Cong. Rec. 12990 (1967) (remarks of Sen. Pastore). This provision was eliminated from the final version of the Act, with the House substituting the requirement that not more than eight of the members could belong to the same party (see 47 U.S.C. (Supp. V) 396(c)).

not lead to "Government control or interference in programming" (S. Rep. No. 222, 90th Cong., 1st Sess. 11 (1967)).

2. The House was equally concerned that government propagandizing not infect public broadcasting. It added Section 399 to the bill as an additional safeguard.

It is notable that, at the House hearings at which the ban on editorializing and political endorsements was suggested, leaders in the field of educational broadcasting themselves argued against these practices. Asked whether any of his member stations broadcast editorials, the president of the National Association of Educational Broadcasters replied emphatically: "They have not, they do not, and they will not." *Public Television Act of 1967: Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 513 (1967) (hereinafter *"1967 House Hearings"*). See also *id.* at 416, 449, 596-597, 641, 731, 747, 804. The director of the New York City Broadcasting System, noting that his station was directly answerable to the mayor, stated (*id.* at 731): "If we were to take an editorial position, it would necessarily have to be that of the administration, and therefore we take none." The representative of the Joint Council on Educational Telecommunications expressed concern about "the control of the facilities so that [they do] not become the implement of those who might use [them] to advance one political philosophy or another in a biased manner." *Id.* at 623.[50] Another witness stated that since public stations were "using, in many cases, tax moneys," they had "a responsibility to the general public for the expenditure of these funds" (*id.* at 514). It was also noted that editorializing might alienate public support (*id.* at 514,

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[50] An educational station manager explained that his station felt that editorializing was inconsistent with its role as a representative of the entire community (*1967 House Hearings*, at 516):

> [T]he board feels that it is representing the whole public. It is drawing funds from all segments of the public. It simply doesn't feel it has any right to impose an opinion of a group or an individual on this general public.

596), and jeopardize the stations' tax exempt status (*id.* at 514, 596, 641).

Noting the testimony that educational stations did not editorialize or wish to do so, the House report stated that the prohibition against editorializing had been added "[o]ut of an abundance of caution" (H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967)).[51] The House left no doubt that its primary motivation was the concern, "shared by all members of the committee," "that the proposed Corporation could become an instrument for political propaganda" (113 Cong. Rec. 28383 (1967) (remarks of Rep. Staggers, chairman of House Comm. on Interstate and Foreign Commerce)).[52]

3. Congress reiterated the same concerns in 1978 when the Senate defeated an Administration proposal[53] to restrict the editorializing ban to those stations "licensed to any governmental agency or instrumentality" (S. 2883, 95th Cong., 2d Sess. § 404(a) (1978)). In a speech that elicited no disagreement, Senator McClure recalled that Section 399 had been adopted to prevent noncommercial broadcasting from becoming "a partisan political tool" and because the CPB's bipartisan board of directors had not been viewed as sufficient protection. He noted: "As we all know,

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[51] See *1967 House Hearings*, at 513 (remarks of Rep. Van Deerlin); *id.* at 643 (remarks of Rep. Ottinger).

[52] Committee Chairman Staggers, explaining the distinction between editorializing by commercial and noncommercial stations, stated (*1967 House Hearings*, at 721) that in the latter case "there is both the use of a public resource and the use of Government funds for financing" (113 Cong. Rec. 26383 (1967)). See also *id.* at 26394 (remarks of Rep. Brotzman); *id.* at 26387, 26407 (remarks of Rep. Springer); *id.* at 26397 (remarks of Rep. Fascell); *1967 House Hearings*, at 417 (remarks of Rep. Carter) (CPB, governed by presidential appointees, provided insufficient protection).

[53] President Carter stated that the "ban makes sense for stations licensed to a state or local government instrumentality. * * * * * Another step toward journalistic independence would be for state and local governments to better insulate these stations. *The danger of undue political control is as real here as at the Federal level.*" *Public Broadcasting System: Message to the Congress*, 2 Pub. Papers 1743 (Oct. 6, 1977) (emphasis added). The Administration proposal was passed by the House (124 Cong. Rec. 19932, 19937 (1978); see also H.R. Rep. No. 95-1178, 95th Cong., 2d Sess. 31 (1978)) but not the Senate (124 Cong. Rec. 15439 (1978)). The House conferees receded (H.R. Conf. Rep. No. 95-1774, 95th Cong., 2d Sess. 35 (1978)).

there have been instances when Public Broadcasting has been criticized for exhibiting bias and a woeful lack of objectivity in its programming." He stated that it was fundamentally unfair to use tax money to propagate controversial private views and that editorializing would jeopardize public broadcasting's "popular acceptance" and financial support. Finally, he observed that "public broadcasters are, themselves, not unanimous or enthusiastic in their support for this proposed change." 124 Cong. Rec. 30058 (1978).

Senator Hollings touched on many of these points. He stressed that "we do not want a Government propaganda agency funded by the taxpayers' dollars," and that "if we allow editorializing or sponsorship of political candidates, it could be the death knell of public broadcasting." 124 Cong. Rec. 30059 (1978).

4. Finally, in 1981, the prohibition against editorializing was amended so as to apply only to those stations receiving CPB grants. This amendment had little practical significance. In 1981, the last year for which such figures are available, all public television stations received CPB grants, as did 214 (or 90%) of the 238 qualified radio stations. CPB, *Annual Report 1981*, at 3-4. The principal result of the 1981 amendment was therefore to exempt those noncommercial radio stations ineligible for CPB aid; these are generally small stations that have low-power transmitters, employ fewer than five full-time employees, or broadcast fewer than 18 hours per day.[54]

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[54] See note 33, *supra*. It is to these relatively insignificant stations that appellees refer when they state (Mot. to Dismiss or Affirm 20 n.13) that before 1981 Section 399 "applied to the hundreds of noncommercial broadcasters that received absolutely no federal funding."

The legislative history suggests that Congress did not even consider these small radio stations when Section 399 was enacted in 1967. Both President Johnson and Congress focused primarily on television. Indeed, as originally introduced the legislation was entitled the Public Television Act and called for the creation of the Corporation for Public Television. See S. 1160, 90th Cong., 1st Sess. (1967). And Congress believed—correctly—that all public television stations would receive CPB grants. See 113 Cong. Rec. 26416 (1967). Contrary to appellees' contention (Mot. to Dismiss or Affirm 6 n.2), there is nothing to suggest that Congress believed that "not all local noncommercial broadcasting stations would receive CPB funding."

During the consideration of the 1981 amendment, Congress reaffirmed its commitment to the purposes served by Section 399. It was again noted that the prohibition alleviated political pressure on publicly funded stations and prevented their use for government propaganda.[55] The particular problems posed by government-owned stations were also stressed again. Referring to "the Denver television station * * * owned by the local school board," Congressman Aylward observed: "One can imagine the kind of conflicts the station would get into if they were allowed to editorialize for candidates for public office."[56]

The impropriety of using tax dollars for partisan or ideological proselytizing was reiterated. Congressman Moorehead stated:

> There is nothing in the First Amendment that guarantees that the Federal Government will give one person a bigger horn than someone else for the exercise of his rights.
>
> When we pay for public broadcasting we are giving them a tremendous voice. If they are going to be allowed to editorialize with Federal money then they have a tremendous advantage over other points of view that may be just as valid.[57]

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[55] Congressman Tauke stated:

> It occurs to me * * * if the Des Moines Register in my own state were receiving public funds its editorial policy would be substantially different or otherwise, it * * * probably would no longer be relying on those Federal funds.
>
> If it were relying on public funds, it could not speak as it does about Members of Congress, members of the Iowa Legislature.

May 11, 1981 Tr. 37 of *Markup of Public Broadcasting Legislation by the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981) (hereinafter "*May 11, 1981 House Markup*").

[56] May 6, 1981 Tr. 75 of *Markup of H.R. 3238 by the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981). See also *Hearings on H.R. 3238 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 10 (1981) (hereinafter "*1981 House Hearings*"); see also *1967 Senate Hearings*, at 10.

[57] *May 11, 1981 House Markup*, at 39; see also *1981 House Hearings*, at 65-66 (remarks of Rep. Swift).

Members also suggested that editorializing might jeopardize public support of noncommercial stations[58] and that editorials by public stations might be viewed as official pronouncements.

C. This Court has consistently recognized that the special character of broadcasting justifies special regulations designed to preserve the public interest in diversity and fairness in broadcasting

1. The district court committed fundamental error by requiring the government to show that Section 399 rested on (what the court could be persuaded was) a "compelling interest." In doing so, the court failed to heed a consistent line of Supreme Court precedent holding that First Amendment analysis in this context must take into account the special characteristics of broadcasting. See, *e.g.*, *CBS, Inc.* v. *FCC*, 453 U.S. 367, 394-397 (1981); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 742 n.17 (1978); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 799-800 (1978); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791 n.30 (1978); *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 101; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969). As the Court stated in *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 101:

> [T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcasting frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

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[58] *May 11, 1981 House Markup*, at 36; *1981 House Hearings*, at 65.

The very right to broadcast depends on a government license to be exercised in the public interest. Broadcast frequencies are both scarce and uniquely powerful;[59] there is therefore a special public interest in assuring that the airwaves are not monopolized by a narrow range of interests and views. (Special regulations to guarantee diversity in broadcasting—such as restrictions (going beyond general antitrust requirements) on the right of newspaper owners to obtain broadcast licenses—are justified on this ground. See *FCC* v. *National Citizens Committee for Broadcasting, supra.*) The fact that the government entrusts licensees with "a valuable and limited public resource" (*CBS, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 101) creates a special tension between the privileges of licensees and the rights of the public, one that the Court has resolved by holding that "[i]t is the right of the viewers and listeners, not the right of the broadcasters,

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[59] It has been suggested that recent technological advances—such as cable TV and direct satellite reception—have ended the days of scarcity in access to broadcasting channels. See Note, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. Mich. J. L. Ref. 541, 553 (1980). The fact is, however—as every resident of the District of Columbia knows—that, though much talked about, the day when most viewers have access to these new technological marvels still lies in the uncertain future. For most viewers, television still consists, *first*, of the two or three or four VHF stations accessible to the community, and, *second*, of a few additional UHF outlets. The fact of scarcity is, of course, vividly recognized by that most realistic of measurements, the market. A VHF station license in an urban market commands a staggering price; channel 5 in Boston was sold in 1982 for $220 million. *Broadcasting/Cablecasting Yearbook 1983*, at C-91. There is acute competition for even UHF licenses in major markets. A UHF license in the San Bernardino Valley was recently revoked; 40 competing applications were received for that channel. FCC Public Notice, *TV Broadcast Applications Accepted for Filing and Notification of Cut-Off Date for San Bernardino, California* (May 18, 1983).

Further, it is clearly for Congress in the first instance to determine whether and when technological changes warrant a major restructuring of our system of broadcast regulation. Congress's determination that—as of now—broadcast licenses still constitute a special public resource to be used for the public interest is surely not unwarranted.

which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390. "'[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said'" (*CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 122, quoting A. Meiklejohn, *Political Freedom* 26 (1948)).

Thus, in First Amendment cases involving regulation of broadcast licensees, the Court has not demanded proof of a compelling government interest of the kind conventionally demanded in other First Amendment contexts.[60] It has recognized that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail * * *" (*Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390); it has tested restrictions placed upon broadcasters in the context of the special public interest in a diverse broadcasting system free from domination by a narrow set of interests. See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 386-392; *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 121-132; *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 744-751; *CBS, Inc.* v. *FCC*, *supra*, 453 U.S. at 394-397. In conducting this "'delicate balancing of competing interests'" (*id.* at 394), the Court has accorded "great weight to the decisions of Congress * * *." *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102; see also *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980).

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[60] Compare, *e.g.*, *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, No. 81-1839 (Mar. 29, 1983), slip op. 7 (state tax that singles out the newspaper press for special treatment cannot withstand First Amendment scrutiny in the absence of "an overriding governmental interest"); *Carey* v. *Brown*, 447 U.S. 455, 461-462 (1980) (statute excluding all non-labor picketing in residential neighborhoods cannot stand unless necessary to serve a compelling state interest and statute is narrowly tailored to achieve that interest); *First National Bank of Boston* v. *Bellotti*, *supra*, 435 U.S. at 786 (state statute unconstitutional unless state can meet its burden to show that the challenged restriction is narrowly drawn to serve a compelling state interest). See generally *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 7-8 (discussion of traditional "public forum" cases).

2. More specifically, this Court has sustained important restrictions upon the right of all broadcasters to editorialize—and has done so without demanding proof of a "compelling" government interest.

This is particularly significant because, in the print media, the right to editorialize is of course virtually unrestricted. A newspaper has no legal duty to act in the public interest; it does not have to serve the public. A newspaper may print editorials or decline to do so. If it editorializes, it may select the topics of its choice. It may remain mute on important issues, while dwelling on subjects of little interest to most persons. It may stridently advance a single point of view; it may not be compelled to cede space for reply to those it attacks. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Subject to narrow restrictions, it may advocate the most extreme measures. And in making factual assertions, it is bounded only by the laws of libel and slander. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

On the other hand, a broadcaster's rights are hedged on all sides.[61] Broadcast licenses may be denied or revoked if the Federal Communications Commission determines that "the public interest, convenience, and necessity" require. 47 U.S.C. 309(a); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). And in making this determination, the Commission takes into consideration a broadcaster's coverage of public affairs.[62]

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[61] Indeed, at one time, all broadcasters were forbidden to editorialize. See *In re Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1940) ("[A]s one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions * * *. The public interest—not the private—is paramount."). The Commission lifted this ban, not because it believed it to be unconstitutional, but because it concluded that "overt licensee editorialization, *within reasonable limits and subject to the general requirements of fairness* * * * is not contrary to the public interest." *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1253 (1949) (emphasis added).

[62] *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 110-112.

Other significant restrictions upon the editorial freedom of broadcasters were upheld in *Red Lion Broadcasting Co.* v. *FCC*, *supra*. In that case, the Court sustained the constitutionality of FCC regulations granting a right to reply (a) "[w]hen during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group" or (b) "[w]here a licensee, in an editorial * * * opposes a legally qualified candidate" (395 U.S. at 373-375). By implication, the Court also upheld the broader "fairness doctrine" on which these rules are based. As the Court has explained (*CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 111), that doctrine imposes two affirmative responsibilities upon all broadcasters: "coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." The Court further stated in *Red Lion* (395 U.S. at 391) that the FCC's personal attack and electoral opposition rules were "indistinguishable" "[i]n terms of constitutional principle" from the equal-time rule (47 U.S.C. 315) under which a candidate for public office is entitled to broadcast time equal to that furnished to his adversary. The Court concluded that all these broadcasting regulations are consistent with the First Amendment's purpose of "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than * * * countenanc[ing] monopolization of that market, whether it be by the Government itself or a private licensee" (395 U.S. at 390).

In sum, all broadcasters have been validly subjected to public responsibilities that prevent use of their stations for unrestrainedly private or partisan ends. In the case of federally funded public broadcasters, Congress has imposed even more careful limitations—among them Section 399's ban on editorializing and on supporting or opposing political candidates. In our view, the special characteristics of noncommercial broadcasting justify the specific prohibitions contained in Section 399.

D. The bar on editorializing and electioneering is an essential element of the congressional plan to create and finance a public broadcasting system devoted to public, not private, purposes

1. The measures the government has adopted to create and foster public broadcasting during the past 50 years—the reservation of a limited number of channels for noncommercial and educational broadcasting; the allocation of these channels throughout the nation; the licensing of numerous noncommercial stations to state and local entities, educational institutions, and broadly based community and nonprofit organizations; the funding of construction of facilities; the production and distribution of educational programming; and the massive financing of noncommercial station operations—represent a national commitment to an important public purpose: the creation and fostering of a special broadcasting system that would give the nation a kind of programming excellence and diversity that the commercial sector could not or would not produce. The countervailing restrictions Congress has imposed on these special stations—including those contained in Section 399—are designed to serve the same generous public purpose. Noncommercial stations, even more than commercial ones, are to be a community resource. They are to be funded by all—through federal and state and local taxes and through tax-deductible contributions. And they are to serve all. They constitute a forum where many voices are to be heard but none is to be preferred and none may be "official." It has always been central to this vision that these public stations should not be dedicated to the propagation of particular partisan and ideological views. Any breach of this principle, as Senator Hollings noted, "could be the death knell of public broadcasting" (124 Cong. Rec. 30059 (1978)).

If editorializing and other partisan political interventions were permitted, public stations would become an inviting target for capture by private interest groups that hope to acquire a powerful voice—at public expense. The fact that the number of public stations is limited—especially in the case of television—makes this concern especially acute. In

most cities the one public TV station is an absolutely unique community asset; it would certainly be highly disturbing if its owners and managers, financed by tax dollars, could use it to propagate partisan ideological ends. This concern would be compounded if numerous educational stations were to be captured by groups representing a narrow set of ideological interests. This Court has recognized that the maintenance of diversity is especially important in the broadcast media;[63] allowing noncommercial stations to serve partisan ends would put strains on this important interest and might eventually involve the FCC in ideological issues when licensing noncommercial stations.

Even more important is the point that allowing educational station owners and managers to use the station to propagate their own partisan ends is wholly irrelevant to, and might seriously interfere with, the public mission for which these stations are licensed and federally funded. That mission is not to serve as a privileged outlet for the political and ideological opinions of station owners and managers, but to provide the public with a special sort of diverse and excellent programming unavailable on commercial radio and TV. That mission includes, of course, the airing of the multitude of lively and controversial public affairs programs—programs on which every possible view may be freely expressed—that have so notably enlivened public radio and television since the beginning, notwithstanding the ban on editorializing. Carrying out that educational mission is a full time job, difficult and often controversial in its own right. Embroilment in partisan political controversies could only distract from that central mission. It could also compromise the broad public support that educational broadcasting desperately needs in order to maintain its independence, its privileged status, and its financial health. Support for educational broadcasting—just like support for many schools and universities—would rapidly erode if these institutions were perceived as serving nar-

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[63] *E.g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 794-802 (1978) (in interest of diversification, FCC may deny broadcast license to owners of newspaper in same community); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

row partisan ends. To compromise the public role of public broadcasting by allowing it to be exploited for partisan ends would endanger this noble enterprise.

2. The ban on editorializing is also justified because it protects against the use of public stations for government propagandizing. That this is an important government interest can scarcely be denied; "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 745-746 (opinion of Stevens, J.; footnote omitted).[64]

Congress specifically found that if public stations were permitted to editorialize, they might feel pressure to broadcast editorials acceptable to those who hold the purse strings. Similarly, if publicly funded stations became associated with particular editorial positions, it would be difficult to prevent political considerations from influencing decisions regarding the appropriation and distribution of such funds.

The district court's opinion, disagreeing with the considered judgment of three Congresses that Section 399 is necessary to insulate public broadcasting from governmental pressures, furnishes no valid basis for striking it down. The court first stressed (J.S. App. 13a) the "modest level" of CPB funding. It noted (*id.* at 12a-13a) that the average station affected by Section 399 received not more than approximately 25% of its 1977 operating budget from CPB; that no such station depended on CPB for more than 33% of its budget; and that only 14% of appellee Pacifica's revenue was allegedly derived from CPB grants.[65]

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[64] *Cf. Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality) (city transit system may refuse to permit political advertisement to prevent appearance of "favoritism"); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 97 (1947) ("principle of required political neutrality for classified public servants"). See also *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102, 1148-1149 (D.C. Cir. 1978) (en banc) (Leventhal, J., dissenting).

[65] There is no formal proof in the record concerning the amount of funding received by the Pacifica stations from government sources. In their Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 18, appellees asserted that of Pacifica's total

The flaws in this reasoning are manifest. When enacting Section 399, Congress made the predictive judgment that CPB funding, whatever its exact level, would be sufficient to create an unhealthy possibility of government control; that judgment is entitled to respect. The constitutionality of Section 399 cannot be tied to the accidents of current levels and trends of federal funding; otherwise the statute's validity would vary from year to year as funding waxes and wanes.

Further, it is not for the court to make a de novo judgment whether 33%, or 25%, or 14% is substantial. For all the district court knows, a 14% decrease in net income may spell bankruptcy for some public broadcasters. For many more, the result could be a significant curtailment of operations, with losses of jobs, salary cuts, and other consequences. The federal government is the largest single source of funding for public broadcasters. See pp. 18-20, *supra*. Congress determines what the exact level of funding should be; its judgment that the potential for influence is substantial should not have been set aside.

The district court also completely ignored the danger of political pressure by state and local governments and their instrumentalities. These sources account for more than 35% of public broadcasting's income (*ibid.*); they own more than two-thirds of all public stations. There thus exists an obvious potential for abuse. And, in fact, instances of political pressure upon the programming of governmental licensees are common enough that in 1981 the National Association of Educational Broadcasters published a collection of case studies (R. Schenkkan, C. Thurston & A. Sheldon, *Case Studies in Institutional Licensee Management*

1978 revenues of "nearly $2 million," "14% came from CPB Community Service Grants" and "8% * * * came from direct federal grants." Appellees did not assert how much they received from CPB in other forms or how much they received in indirect federal aid or from state and local government. In response to a request for more detailed funding figures, appellees' counsel later stated that "Pacifica is reluctant to release any more financial information than is absolutely necessary" but asserted that in fiscal 1981 "between 20-25% of Pacifica's gross operating budget [came] from CPB grants" (see Appendix to Defendant's Supplemental Memorandum on Amendment of Section 399 (Sept. 14, 1981), App., 2a, *infra*).

(1980)).[66] Similarly, a survey of public television stations to determine whether they would editorialize if allowed to do so reported that "managers of state-licensed stations, some of which receive sizeable appropriations, responded that [the potential impact of editorials on their sources of funding] would be a 'very important' factor in their decision." Wollert & Haney, *Editorializing and Fundraising: Does It Mix?* 7 Pub. Telecommunications Rev., No. 5, at 34, 36 (Sept./Oct. 1979).[67]

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[66] See also *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102, 1114-1115 (D.C. Cir. 1978) (executive director of Maryland Center for Public Broadcasting stated "it would be unlikely that his viewers would see a program highly critical of the Maryland General Assembly, since the Assembly is the source of two thirds of the system's funding"); Lucoff, *The University and Public Radio: Who's in Charge?*, 7 Pub. Telecommunications Rev., No. 5, at 22-26 (Sept./Oct. 1979) (account of administration control of programming at state university radio station; concludes (at 26) that "[s]olving the problem of insulating the programming process from those who supply the funding has defied the best minds in public broadcasting"); Thurston, *Insulation and Institutional Licensees*, 8 Pub. Telecommunications Rev., No. 2, at 10-14 (Mar./Apr. 1980).

[67] In recognition of these dangers, some—but by no means all—states have enacted laws to prevent the use of publicly owned stations for partisan purposes. See Fla. Stat. § 229.905(4) (1977 & Cum. Supp. 1983) (crime to use educational television to support political candidate); Ky. Rev. Stat. Ann. § 168.100(2) (Bobbs-Merrill 1980) (prohibits political propaganda or "image or message in the interests of any political party or candidate for public office"); La. Rev. Stat. Ann. § 17.2506 (West 1982) (prohibits presentation of "biased or one-sided aspects of partisan politics" or advocating or opposing any political candidacy or legislation); N.J. Stat. Ann. § 48:23-9 (West Cum. Supp. 1982) (prohibiting support of or opposition to political party or candidate or attempting to influence enactment of legislation); N.Y. Educ. Law § 236 (McKinney Cum. Supp. 1982) (state charter may be revoked if station used for partisan or political purposes or to influence legislation); Okla. Stat. Ann. tit. 70, § 23-102 (West Cum. Supp. 1982) (crime for elected official to influence or attempt to influence public television program content for personal gain or political benefit); R.I. Gen. Laws § 16-28-3 (1981) (prohibits sponsorship of any individual's election); S.D. Codified Laws Ann. § 13-47-17 (1982) (state board must assure that facilities not used to broadcast propaganda or influence legislation).

The district court also suggested (J.S. App. 13a) that the fear of government influence was "speculative" because of the "protective insulation" provided by the CPB.[68] As we have noted, Congress wrestled with the problem of structuring the CPB board so as to provide such insulation; it ultimately concluded that additional measures were required. In our view, the courts should not second-guess Congress's judgment about the adequacy of the insulation provided by the CPB or the appropriate combination of means for achieving this obviously legitimate objective.[69]

Finally, the district court placed reliance (J.S. App. 14a) on the fairness doctrine. It is important to remember, however, that the fairness doctrine is itself a significant limitation on the right to editorialize, and has essentially the same constitutional grounding as Section 399. Both provisions reflect the judgment that unrestrained partisanship by broadcast licensees may threaten First Amendment

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These laws show that some legislatures perceived the danger that state-owned stations might be used for partisan ends. Ironically the broad language of some of them, which contrasts with Section 399's narrow prohibition against editorializing, creates the danger of authorizing the control of program content by politically appointed state broadcasting authorities.

[68] While appellees now contend that the present system "*ensure[s]* that CPB-funded stations will not be vulnerable" to political influence (Mot. to Dismiss or Affirm 19; emphasis added), during debate on the 1978 amendments to the Public Broadcasting Act, appellee Waxman stated that the Corporation is "composed of political appointees" (124 Cong. Reg. 37037 (1978)) and added (*ibid.*): "Further steps must be taken * * * to provide a greater degree of insulation for both [public broadcasting's] funding sources and programming decisions."

[69] The district court relied (J.S. App. 13a) on the fact that CPB grants are distributed according to "objective, nondiscretionary criteria." This statement is a considerable over-simplification. See, *e.g.*, 47 U.S.C. (Supp. V) 396(g)(2)(B) (discretionary grants to stations for program production). The district court cited a passage in the second Carnegie Commission report noting that the system by which federal funds were allocated among stations was " 'well positioned to avoid review of program content as a condition for increased funding' " (J.S. App. 14a n.8, quoting *Carnegie II*, at 124). The court failed, however, to note the Commission's conclusion that in actual practice "the purpose of [the plan]—the insulation from annual political review of the system—has been undermined." *Carnegie II*, at 125-126.

values, see *Red Lion Broadcasting Co.* v. *FCC*, *supra:* to invalidate one because the government happens currently also to be utilizing the other is inconsistent and substitutes ad hoc policy judgments for constitutional doctrine. Moreover, the fairness doctrine has a limited scope, and Congress had a reasonable basis for concluding that additional safeguards are needed against the use of public stations for government propagandizing.[70]

3. The prohibition on editorializing serves an additional important interest, one not discussed by the district court: it prevents the use of taxpayer money to promote private views. The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). This Court held in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234 (1977), that a city board of education could not require teachers, as a condition of employment, to pay union dues insofar as these dues were used by the union to express political views, to support political candidates, or to advance other ideological causes "not germane to its duties as collective-bargaining representative" (*id.* at 235; footnote omitted). The Court explained (*ibid.*) that the First Amendment prohibited the board "from requiring [a teacher] to contribute to the support of an ideological cause

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[70] The personal attack and political editorial rules (47 C.F.R. 73.1920 and 73.1930) apply only in narrow circumstances. Neither would apply, for example, if a broadcaster simply editorialized on a controversial issue of public importance without attacking any person or group or opposing a candidate. The broader fairness doctrine would in that situation require only that the broadcaster provide a "'reasonable opportunity for the presentation of contrasting viewpoints.'" 39 Fed. Reg. 26372, 26375 (1974). The broadcaster would retain considerable discretion in selecting the opposing spokesman to be heard, the amount of time to be allotted, the time of day at which the presentation would be broadcast, and the format to be employed (*id.* at 26377-26378). The fairness doctrine thus does not purport to put a licensee who editorializes on the same footing as a spokesman for a contrasting view. Furthermore, an editorial endorsed by a "public" station might carry far more weight than any response by a private individual. Finally, the FCC has recently proposed modifying or repealing its personal attack and political editorial rules. *Notice of Proposed Rule Making In re Repeal or Modification of the Personal Attack and Political Editorial Rules*, FCC Gen. Docket No. 83-484 (adopted May 12, 1983).

he may oppose as a condition of holding a job as a public school teacher."

Section 399 supports the same principle. It would be fundamentally wrong to exact tax money from all citizens and then give it to television and radio stations so that the stations can espouse causes with which a great many taxpayers might disagree. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley* v. *Maynard*, *supra*, 430 U.S. at 714. This problem is here magnified by the tremendous power of the broadcast media and by the ironic fact that government-funded "public" television stations may be less answerable to the public than commercial stations dependent upon ratings for advertising revenue.[71]

The ban on editorializing also avoids another danger: the appearance that, by providing funds to public stations, the government has endorsed or "prescribe[d] as orthodox" a particular view on the issues. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 645 (1943). See also *Wooley* v. *Maynard*, *supra* (state may not compel driver to display on license plate a state motto repugnant to his moral, religious, and political beliefs).[72]

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[71] When commercial broadcasters choose to advance their private political, social, and economic views, they are bounded by "the acceptance of a sufficient number of [viewers or listeners]—and hence advertisers—to assure financial success * * *" (*CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 117 (opinion of Burger, C.J.)). In the case of noncommercial stations, this factor is less important, since private contributions supply only part of their budgets.

[72] To be sure, in a democracy the very conduct of government necessarily entails some political advocacy: government officials must communicate with the people, explain their programs, and provide leadership and direction to the nation. Members of Congress and the President and his political appointees necessarily participate in forms of political advocacy. And because these communications are "germane to [the officials'] duties" (*Abood* v. *Detroit Board of Education*, *supra*, 431 U.S. at 235), they may properly be supported with public funds. But all of that stands on a wholly different footing from the question presented here—whether Congress has power to insist that taxpayer funds not be used to subsidize the propagation of *private* political views that may be unwelcome or even repugnant to many taxpayers.

E. The free marketplace of ideas is not substantially inhibited by Congress's decision that owners and managers of public stations should not have a privileged voice

The restriction on editorializing in Section 399 interferes only minimally with the free marketplace of ideas. As noted, "editorializing" means only the expression of a licensee's views by management or a management spokesman (*In re Complaint of Accuracy in Media, Inc.*, *supra*, 45 F.C.C.2d at 302). Station employees, journalists, academics, polemicists and politicians remain free to express their views. Public figures may be invited to give their opinions or may be interviewed by an interviewer of management's choice. Any news subject may be covered in any manner. Any documentary or show may be aired. In addition, the prohibition against editorializing is strictly neutral; it makes no effort to restrict only those expressions of opinion with which those in positions of authority might disagree. See *Regan* v. *Taxation With Representation*, *supra*, slip op. 7, 9; concurring opinion at 1 (Blackmun, J.). Finally, the prohibition against editorializing applies only to the use of subsidized broadcast facilities; it does not prevent Pacifica from expressing its views on any other station or in any other medium (including the publications that many noncommercial stations mail to their contributors).

Anyone who has watched public television or listened to public radio knows that they devote substantial air time to public affairs programming; programs such as the *McNeil/Lehrer Report*, *Washington Week in Review*, *Wall Street Week*, *Firing Line*, and *All Things Considered*, provide a broad and lively range of views on diverse and controversial topics.

Moreover, any station that finds the ban on editorializing unduly restrictive is free to decline CPB grants. If such grants really are only an insignificant part of a station's budget—as the district court opined (see J.S. App. 12a-14a)—this should not represent a major sacrifice. If, on the other hand, federal subsidies are critical for a station's operations, management should not complain that it cannot use public funds to express its own views. Station owners and managers subject to Section 399 are, after all, in no

worse position than other persons denied special access to the airwaves to express their views. *CBS, Inc.* v. *Democratic National Committee, supra.* See *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 389 ("as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused"). In arguing that the First Amendment guarantees its right to editorialize on a public station, Pacifica is claiming the right to magnify the force and reach of its opinions through the use of a valuable public resource sustained by public funds and entrusted to it for the purpose of providing a public service. The First Amendment should not be interpreted to give owners and managers of public stations such a privileged voice.

II. CONGRESS HAS POWER TO DETERMINE THAT IT WILL NOT SUBSIDIZE PRIVATE EDITORIALIZING AND ELECTIONEERING

Section 399 is constitutional for another—simple—reason. That provision does not in any way prohibit noncommercial stations from exercising their right to freedom of expression. Congress has merely provided, in the proper exercise of its Spending Power, that it will not subsidize public broadcasting station editorials. "A federal agency providing financial assistance to a public television station may, of course, attach conditions to its subsidy that will have the effect of subjecting such licensee to more stringent requirements than must be met by a commercial licensee." *Community Television of Southern California* v. *Gottfried,* No. 81-298 (Feb. 22, 1983), slip op. 13.[73]

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[73] See also *Fullilove* v. *Klutznick,* 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.).

The fact that two-thirds of all public broadcasting stations are licensed to state authorities, subdivisions of state government, and other government-affiliated entities, gives particular relevance to the line of cases recognizing that "Congress' power to legislate pursuant to the spending power" includes the authority to "fix the terms on which it shall disburse federal money to the States." *Pennhurst State School* v. *Halderman,* 451 U.S. 1, 17 (1981). In *Oklahoma* v. *CSC,* 330 U.S. 127 (1947), the Court upheld a provision of the Hatch Act prohibiting partisan political activity by state employees whose principal employ-

To demonstrate the constitutionality of the contested provision of Section 399, it is necessary to look no further than this Court's recent, unanimous decision in *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983) (*"TWR"*), holding that Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.) does not abridge the First Amendment. Section 501(c)(3) withholds tax exempt status from a nonprofit organization if a "substantial part" of its activities are devoted to "carrying on propaganda, or otherwise attempting, to influence legislation." Equating the tax exemption granted by that provision to "a cash grant to the organization of the amount of tax it would have to pay on its income" (*TWR*, *supra*, slip op. 3-4), the Court explained (*id.* at 4) that Section 501(c)(3) simply expressed Congress's choice not "to subsidize lobbying as extensively as * * * other activities that non profit organizations undertake to promote the public welfare."

The Court rejected the argument that "the prohibition against substantial lobbying by § 501(c)(3) organizations imposes an 'unconstitutional condition' on the receipt of tax-deductible contributions" (*TWR*, *supra*, slip op. 5). The Court acknowledged that "the government may not deny a benefit to a person because he exercises a constitutional right," but explained (*ibid.*):

> The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.
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> * * * * *
>
> Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying.

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ment was in connection with a federally-financed activity. Insofar as Section 399 applies to stations licensed to government-affiliated entities, *CSC* is directly controlling.

The reasoning of *TWR* is applicable to the present case.[74] In neither case did Congress prohibit the exercise of First Amendment rights. In both cases, Congress simply decided not to subsidize private partisanship.[75]

Appellees have argued (Mot. to Dismiss or Affirm 16; emphasis in original) that Section 399 is unconstitutional because it "does not * * * simply restrict the manner in which the noncommercial broadcaster may spend the grant it receives" but "imposes an outright restraint on what the broadcaster may do or say with *any* of its funds." This argument was implicitly rejected in *TWR* and has no greater validity here. The tax exemption provided by Section 501(c)(3) and CPB's unrestricted grants both benefit all aspects of the subsidized organizations. CPB community service grants are used "to produce or purchase programs, hire production staff, buy equipment or make other capital improvements, provide training, promote programs or finance fund-raising activities" (CPB, *Annual Report 1981*, at 7).[76] Without these grants, there might be no staff mem-

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[74] The concurring opinion in *TWR* also supports the constitutionality of Section 399. The concurrence was based upon the fact that a nonprofit organization "may use its * * * § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying" (concurring slip op. 2). Pacifica—which owns five stations—is free to editorialize on any unsubsidized station while continuing to operate a subsidized one. Moreover, unlike Section 501(c)(3), which applies to lobbying or propagandizing by any means, Section 399 applies only to broadcasting. It does not prevent Pacifica from editorializing in any other medium.

[75] To be sure, Section 501(c)(3) withholds a tax subsidy only if a nonprofit organization engages in "substantial" propaganda activities, whereas 47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, withholds federal funding if a noncommercial broadcasting station engages in any editorializing. However, the principle of *TWR* would just as clearly apply if the statute withheld tax exempt status from any organization that engages in any lobbying. In enacting such a law, Congress would have "simply chosen not to pay for [the organization's] lobbying" (slip op. 5).

[76] Appellees have argued (Mot. to Dismiss or Affirm 16 & n.9) that CPB grants do not count as federal subsidies. However, those funds are appropriated from the Treasury (47 U.S.C. (Supp. V) 396(k), as amended by Pub. L. No. 97-53, Title XII, Section 1227, 95 Stat. 727), and the mere fact that they pass through the CPB does not prevent

bers to write, edit, or deliver an editorial; no station support staff; no popular programs to attract an audience for the editorial or stimulate private contributions; and no studio, antenna, or other broadcast facilities. As in the case of the tax exemption, the only way to prevent federal funds from subsidizing the activities that Congress wished not to subsidize (lobbying in the case of Section 501(c)(3); editorializing in the case of Section 399) is to ban a subsidized organization from engaging in the activities.

Appellees have also argued (Mot. to Dismiss or Affirm 17) that Section 399 places an unconstitutional condition upon the receipt of CPB funds. But like *TWR*, the present case is readily distinguishable from those in which the government denied a person a benefit because he exercised a constitutional right. Two such cases—*Speiser* v. *Randall*, 357 U.S. 513 (1958), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972)—were mentioned in *TWR* (slip op. 5), and they serve to illustrate the distinction. In *Speiser*, taxpayers were denied a property tax exemption for honorably discharged veterans because they refused to sign a declaration stating that they did not advocate the forcible overthrow of the government. In *Perry*, a state college professor was allegedly denied reemployment because he criticized the Board of Regents. Only in the most strained and artificial sense could it be said that the law in *Speiser* prevented government subsidy of taxpayer speech (*i.e.*, the refusal to sign the required declaration). Similarly, in *Perry*, retention of the professor could not be deemed a state subsidy of the teacher's criticisms of the Board.[77]

Congress, in the exercise of its Spending Power, from specifying how they shall be spent. *Cf. CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 149-150 (Douglas, J., concurring). To hold otherwise would bring down the entire structure of the Public Broadcasting Act, which specifies in some detail how those grants are to be used. See 47 U.S.C. (Supp. V) 396(k), as amended by Pub. L. No. 97-53, Title XII, Section 1227, 95 Stat. 727; H.R. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 892-894 (1981). Whether CPB grants constitute "federal financial assistance" within the meaning of certain federal statutes (*e.g.*, 20 U.S.C. 1681(a); 29 U.S.C. (Supp. V) 794; 42 U.S.C. 2000d) is not relevant here (compare Mot. to Dismiss or Affirm 16 n.9).

[77] In this regard, appellees' hypothetical (Mot. to Dismiss or Affirm 17-18) is entirely different from that in our jurisdictional statement (at 10 n.10). The government could not prohibit outside research by a

Speiser and like cases are distinguishable in another critical respect, as this Court noted in *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 800-801. In that case regulations, prospectively barring newspapers from obtaining broadcast licenses in the same community, were attacked on the ground that they "unconstitutionally condition[ed] receipt of a broadcast license upon forfeiture of the right to publish a newspaper" (*id.* at 800). Rejecting this argument for a unanimous Court, Justice Marshall pointed out (*id.* at 801; emphasis added) that *Speiser* and related cases were inapposite because there denial of a benefit "was based solely on *the content of constitutionally protected speech*," whereas the challenged regulations were "not content related." Here, of course, Section 399 prohibits all editorializing, without regard to content.

Finally, in *Speiser* and similar cases, the restrictions on speech bore little relationship to the purpose for the government funding; their only aim was to limit expression. In *Speiser*, the purpose of the tax exemption was presumably to reward veterans, an objective unrelated to the desirability of signing the prescribed declaration. And in *Perry* v. *Sindermann*, *supra*, the purpose of employing the teacher was to provide instruction for students. Restricting speech that did not interfere with the performance of that task obviously did not serve that purpose. Here, by contrast, as we have shown, Congress has consistently determined that the prohibition against editorializing by CPB-funded stations is integral to the purposes it sought to achieve in creating and subsidizing a public broadcasting system.

Section 399, in sum, does not prevent any person or organization from engaging in any form of expression. "Congress has simply chosen not to pay for [public broadcasting

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college professor who received a small grant to conduct research in a particular area because, assuming that he properly performed the research called for in the grant, the government would not be financing his other work any more than it would be financing his private life. However, to take a hypothetical more analogous to Section 399, if the government gave him access to a federally financed laboratory for the purpose of doing the grant research, it could legitimately insist that he not use the facility for printing political propaganda pamphlets.

stations' editorializing]" (*TWR*, *supra*, slip op. 5). This Court should "again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State'" (*id.* at 5, quoting *Cammarano* v. *United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).[78]

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JUNE 1983

[78] There are many other valid statutes based on the same principle. For instance, Congress has prohibited the unauthorized use of federal funds for lobbying (18 U.S.C. 1913), even though lobbying is protected by the First Amendment. Congress has also prohibited the International Communication Agency (the successor of the United States Information Agency and the Voice of America) from disseminating information within this country (22 U.S.C. (Supp. V) 1461), despite the fact that such a restriction would certainly violate the First Amendment if applied to a private news organization. And 2 U.S.C. 441c prohibits government contractors from making political contributions during the life of the contract even though the First Amendment protects a citizen's right to make such contributions (see *Buckley* v. *Valeo*, 424 U.S. 1, 22-23 (1976)).

APPENDIX

1. The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, provides:

> No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

ATTACHMENT A

(Appendix to Defendant's Supplemental Memorandum on Amendment of Section 399 (Sept. 14, 1981).

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July 13, 1981

Mr. Andrew Tashman, Esq.
Special Litigation Counsel
Civil Division, Federal Programs Branch
Department of Justice
Washington, DC 20530

re: *League of Women Voters v. FCC*
Civ. No. 79-1562-MML (Px)

Dear Andrew:

Enclosed is a copy of our Supplemental Memorandum in Support of Motion for Summary Judgment.

Due to the fact that Pacifica's Director is out of town this month, I am having some problems getting the detailed funding figures that you had requested. Moreover, Pacifica is reluctant to release any more financial information than is absolutely necessary. Pacifica's chairman, Peter Franck, has agreed to reveal the following facts: In fiscal year 1981, between 20-25% of Pacifica's gross operating budget comes from CPB grants. This is a higher percentage than ever before; the percentage of the budget derived from CPB funds has increased a little bit each year. Pacifica has also obtained funds under the National Telecommunications and Information Agency's facilities program. (For the record, NTIA was part of HEW until about two years ago when it became part of the Commerce Department.) Pacifica receives only a tiny part of its budget from state and local funding sources. If you require additional information about Pacifica's funding, please call me.

I would very much appreciate your sending a copy of your reply brief by express mail to Peter Franck at the same time you send us a copy. He is leaving the country on July 24th and would like the opportunity to review your papers before leaving. His address is:

* * * *

Thank you, and I'll talk to you soon.

Very truly yours,

Alletta d'A. Belin

Ad'AB:pmk
Enclosure